Ranggong ak Jenau & Ors v BLD Resources Sdn Bhd & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-01–408–12 OF 2013 AND Q-02–2575–11 OF 2013
ZAWAWI SALLEH, VERNON ONG AND ABDUL KARIM JJCA
27 OCTOBER 2017

Native Law and Custom — Land dispute — Native customary rights ('NCR') over land — Balance of probability — Trespassing — Whether trial judge correct in holding that plaintiffs failed to prove on a balance of probabilities that they acquired and/or inherited NCR over area of land at Sungai Sah, Ulu Sungai Niah, including Lot 91 — Whether trial judge erred in law and/or in fact in failing to apply or failed to apply correctly 'balance of probability' test to evidence of plaintiff's witnesses in respect of communal land boundary or antara/garis

BLD Resources Sdn Bhd ('the defendant') had filed the second suit ('the second suit') and claimed that PW17 had trespassed on and carried out works to clear a portion of Lot 91 Sawai Land District ('Lot 91') to carry out plantation works. Ranggong ak Jenau and ten others ('the plaintiffs') later filed the first suit ('the first suit') and represented themselves as well as on behalf of all the residents of the longhouse known as Rumah Ranggong against the defendants. The land or area within the communal land boundary of Rumah Ranggong was identified by the former native office at subdistrict office at Sepupok, Niah as 'Ranggong's Area' in the 'Composite Plan Showing Distribution of Native Farming Land at Suai/Niah/Sibuti'. The plaintiffs asserted that Rumah Ranggong had remained the same as it was always recognised or accepted by the people of the neighbouring longhouses until today. The main issues for determination by the court were: (a) whether the trial judge was correct in holding that the plaintiffs had failed to prove on a balance of probabilities that they had acquired and/or inherited native customary rights ('NCR') over an area of land at Sungai Sah, Ulu Sungai Niah, including Lot 91; and (b) whether the trial judge had erred in law and/or in fact in failing to apply or had failed to apply correctly the 'balance of probability' test to the evidence of the plaintiff's witnesses in respect of communal land boundary or *antara/garis* of Rumah Ranggong.

Held, dismissing the appeals with no order as to costs:

(1) The learned judge's findings of fact were thorough, detailed and amply supported by substantial evidence on record. Legally acceptable

articulated reasons for rejecting evidence of plaintiff's witnesses were provided by the trial judge. There was no cogent reason for the decision to be disturbed (see para 25).

(2) The same conclusion as the learned trial judge was reached in the present appeal. It was found that: (a) the plaintiff's evidence did not show Lot 91 to be within the plaintiff's alleged communal land boundary; (b) the size of the NCR land was incorrect and could not be substantiated; (c) none of the Tembawai were shown in the maps ('ID7 and P12'); (d) the accuracy of ID7 and P12 was doubtful; and (e) there was no provision in the Sarawak Land Code which provided that the plaintiff's or the native occupier of state land should be given priority or preference or a right to be heard in the event that the Sarawak Government intended to alienate the land occupied by them to a third party (see para 26).

(3) The court agreed with the findings of fact of the learned trial judge that no credible evidence or corroborating evidence to support the plaintiff's own self-serving statements that Lot 91 was within the boundary of land previously allocated or distributed to Rumah Ranggong by the government for their farming (see para 34).

(4) The learned trial judge had scrutinised the evidence with care in deciding whether Lot 91 was within the boundary of land previously allocated or distributed to Rumah Ranggong by the government for their farming. It was found that there was no clear convincing and cogent evidence to satisfy the balance of probabilities test. The learned trial judge had considered the totality of evidence and had assessed the impact of contradictions obtained in the evidence of the plaintiff's witnesses in relation to the core issue. The credibility and reliability of the plaintiff's witnesses was also considered. The plaintiffs had failed to demonstrate that the decision of the trial judge was 'plainly wrong' (see paras 36 & 39).

(5) In relation to the second suit, the court agreed with the findings of the trial judge that the first defendant did not plead that the first to 11th plaintiffs had trespassed and occupied Lot 91 and did not identify the individuals who had trespassed and occupied Lot 91. Substantial hardship would likely be caused to the plaintiffs should the reliefs sought for by the first defendants were granted (see paras 41 & 42).

[Bahasa Malaysia summary

BLD Resources Sdn Bhd ('defendan') telah memfailkan guaman kedua ('guaman kedua') dan mendakwa bahawa PW17 telah menceroboh dan menjalankan kerja untuk melapangkan sebahagian Lot 91 Kawasan Tanah Sawai ('Lot 91') bagi menjalankan kerja penanaman. Ranggong ak Jenau dan sepuluh yang lain ('plaintif-plaintif') kemudian telah memfailkan guaman pertama ('guaman pertama') dan mewakili diri masing-masing dan juga bagi pihak semua pemastautin rumah panjang yang dikenali sebagai Rumah

Ranggong terhadap defendan-defendan. Tanah atau kawasan dalam sempadan tanah komunal Rumah Ranggong telah dikenalpasti oleh mantan pejabat anak negeri di pejabat subdaerah di Sepupok, Niah sebagai 'Ranggong's Area' dalam 'Composite Plan Showing Distribution of Native Farming Land at Suai/Niah/Sibuti'. Plaintif-plaintif menegaskan bahawa Rumah Ranggong kekal sama sepertimana ia dikenali atau diterima oleh orang di kejiranan rumah panjang sehingga hari ini. Isu-isu utama untuk ditentukan oleh mahkamah adalah: (a) sama ada hakim perbicaraan betul dalam memutuskan bahawa plaintif-plaintif telah gagal untuk membuktikan atas imbangan kebarangkalian bahawa mereka telah memperoleh dan/atau mewarisi hak adat anak negeri ('HAAN') ke atas kawasan tanah di Sungai Sah, Ulu Sungai Niah, termasuk Lot 91; dan (b) sama ada hakim perbicaraan telah terkhilaf dari segi undang-undang dan/atau fakta kerana gagal memakai atau telah gagal memakai dengan betul ujian 'balance of probability' terhadap keterangan saksi-saksi plaintif berkaitan sempadan tanah adat atau antara/garis Rumah Ranggong.

Diputuskan, menolak rayuan-rayuan tanpa perintah untuk kos:

(1) Dapatan fakta hakim yang bijaksana adalah teliti, terperinci dan cukup disokong oleh keterangan substantial atas rekod. Sebab-sebab yang boleh diterima dari segi perundangan untuk menolak keterangan saksi-saksi plaintif diberikan oleh hakim perbicaraan. Tiada sebab kukuh untuk keputusan itu diganggu (lihat perenggan 25).

(2) Kesimpulan yang sama telah dicapai sepertimana yang dibuat oleh hakim perbicaraan yang bijaksana dalam rayuan ini. Ia didapati bahawa: (a) keterangan plaintif tidak menunjukkan Lot 91 berada dalam sempadan tanah adat plaintif seperti dikatakan; (b) saiz tanah HAAN adalah tidak betul dan tidak boleh dikekalkan; (c) tiada Tembawai ditunjukkan dalam peta-peta itu ('ID7 dan P12')' (d) ketepatan ID7 dan P12 adalah diragui; dan (e) tiada peruntukan dalam Kanun Tanah Sarawak yang memperuntukkan bahawa plaintif atau penduduk asal tanah kerajaan negeri patut diberikan keutamaan atau kelebihan atau hak untuk didengar sekiranya Kerajaan Sarawak berniat untuk memindah milik tanah yang didiami oleh mereka kepada pihak ketiga (lihat perenggan 26).

(3) Mahkamah bersetuju dengan dapatan fakta hakim perbicaraan yang bijaksana bahawa tiada keterangan yang boleh dipercayai atau keterangan sokongan bagi menyokong kenyataan yang memperjelaskan sendiri plaintif bahawa Lot 91 adalah dalam sempadan tanah yang sebelum itu diperuntukkan atau diberikan kepada Rumah Ranggong oleh kerajaan untuk pertanian mereka (lihat perenggan 34).

(4) Hakim perbicaraan yang bijaksana telah meneliti keterangan dengan berhati-hati dalam memutuskan sama ada Lot 91 adalah dalam

A sempadan tanah yang sebelum ini diperuntukkan atau diedarkan kepada Rumah Ranggon oleh Kerajaan untuk pertanian mereka. Ia didapati bahawa tiada keterangan yang meyakinkan untuk membuktikan ujian imbangan kebarangkalian. Hakim perbicaraan yang bjaksana telah mengambil kira keseluruhan keterangan dan telah menilai kesan
B percanggahan yang didapati dalam keterangan saksi-saksi plaintif berkaitan isu utama ini. Kebolehpercayaan dan kebergantungan saksi-saksi plaintif juga dipertimbangkan. Plaintif-plaintif telah gagal menunjukkan bahawa keputusan hakim perbicaraan adalah 'plainly wrong' (lihat perenggan 36 & 39).
C

(5) Berhubung guaman kedua, mahkamah bersetuju dengan dapatan hakim perbicaraan bahawa defendan pertama tidak mempli bahawa plaintif-plaintif pertama hingga ke-11 telah menceroboh dan mendiami Lot 91 dan tidak mengenalpasti individu-individu yang mencerooh dan
D mendiami Lot 91. Kesukaran yang substantial akan kemungkinan berlaku kepada plaintif-plaintif jika relif yang dipohon oleh defendan pertama diberikan (lihat perenggan 41).]

Notes

E For cases on native customary rights (NCR) over land, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 798–799.

Cases referred to

B (Children), In re [2009] AC 11, HL (refd)
F *Bato Bagi & Ors v Government of the State of Sarawak* [2008] 5 MLJ 547, HC (refd)
Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2013] 5 MLJ 149; [2013] 4 AMR 701, FC (refd)
BLD Resources Sdn Bhd v Changgai ak Dali Suit No MYY-21–3/3 of 2012
G (unreported), HC (refd)
Lah Anyie & Ors v Land Custody and Development Authority (LCDA) & Ors Suit No 22–59 of 1997 (MR) (unreported), HC (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Ranggong ak Jenau & 10 Ors v BLD Resources Sdn Bhd & 2 Ors Suit No
H MYY-22–3/3 of 2012 (unreported), HC (refd)
SOP Plantations (Suai) Sdn Bhd v Ading ak Layang & Ors [2004] 4 MLJ 180, HC (refd)
Swiss Garden Rewards Sdn Bhd v Mohamed Ashrof Tambi bin Abdullah & Ors [2017] 4 MLJ 164, CA (refd)
I *U Television Sdn Bhd & Anor v Comintel Sdn Bhd* [2017] 5 MLJ 292, FC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102
Land Code (Cap 81) ss 2, 5(1), (2), 10

Local Authorities (Annual Payment In Lieu of Rates) Order 2006
Malaysian Palm Oil Board Act 1998
Palm Oil Registration and Licensing Authority (Incorporation) Act 1976 (repealed by Malaysian Palm Oil Board Act 1998)
Palm Oil Research and Development Act 1979 (repealed by Malaysian Palm Oil Board Act 1998)

Appeal from: Suit Nos MYY-21–3/3 of 2012 and MYY-22–3/3 of 2012 (High Court, Miri)

Harrison Ngau Laing (HNL & Co) in Civil Appeal No Q-01–408–12 of 2013 for the appellant.
Tan Thiam Teck (Tan & Lim Advocates) in Civil Appeal No Q-02–2575–11 of 2013 for the appellant.
Tan Thiam Teck (Tan & Lim Advocates) in Civil Appeal No Q-01–408–12 of 2013 for the first respondent.
Joseph Chioh Hock Hua (State Counsel, State Attorney-General's Chambers) in Civil Appeal No Q-01–408–12 of 2013 for the second and third respondents.
Harrison Ngau Laing (HNL & Co) in Civil Appeal No Q-02–2575–11 of 2013 for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] Assailed in these appeals is the decision of the High Court of Miri (Stephen Chung Hian Guan J, presiding) ('the learned trial judge') delivered on 18 October 2010, dismissing:

(a) the plaintiffs' claim in Miri High Court (*Ranggong ak Jenau & 10 Ors v BLD Resources Sdn Bhd & 2 Ors* Suit No MYY-22–3/3 of 2012 (unreported)) ('the first suit'); and

(b) the first defendant's counterclaim in Miri High Court (*BLD Resources Sdn Bhd v Changgai ak Dali* Suit No MYY-21–3/3 of 2012 (unreported)) ('the second suit').

[2] For ease of reference, in this judgment, the parties will be referred to as they were in the court below:

(i) the first suit

The plaintiffs ('Ranggong ak Jenau & 10 Ors')	—	the plaintiffs
BLD Resources Sdn Bhd	—	the first defendant
Superintendent of Lands & Surveys, Miri Division	—	the second defendant

Government of the State of Sarawak	— the third defendant
(ii) the second suit	
The plaintiff ('BLD Resources Sdn Bhd')	— the first defendant
Changgai ak Dali	— PW17

[3] The central issue that is cross-cutting the entire appeal is whether the learned trial judge was correct in holding that the plaintiffs had failed to prove on a balance of probabilities that they had acquired and/or inherited native customary rights ('NCR') over an area of land at Sungai Sah, Ulu Sungai Niah, including Lot 91 Sawai Land District ('Lot 91').

[4] For the reasons that follow, we affirmed the learned trial judge's dismissal of the plaintiffs' claim in the first suit and the first defendant's counterclaim in the second suit.

FACTS AND PROCEDURAL BACKGROUND

[5] The hearing of these cases has had a chequered history. The first defendant filed the second suit in the Kuching High Court against PW17 for trespassing on and carrying out works to clear a portion of Lot 91 for the purpose of carrying out plantation activities.

[6] Subsequently, the plaintiffs filed the first suit in the Kuching High Court, representing themselves as well as on behalf of all the residents of the longhouse known as Rumah Ranggong in Sungai Sah, Ulu Sungai Niah, Niah, Miri Division, Sarawak against the first, second and third defendants.

[7] Both suits were then transferred to Miri High Court on the basis that Lot 91 and the claimed area are within the jurisdiction of the Miri High Court. Both suits were jointly tried before the Miri High Court.

[8] The plaintiffs' case is based on primary and secondary sources. They claimed that they are Iban and natives of Sarawak. Their ancestors had migrated from their former longhouse in Sri Aman sometimes in early 1930s and settled and built their longhouse at Sungai Setapang, a tributary of Sungai Niah. They were led by one Penghulu Manggoi.

[9] Sometimes in the 1940s, a group led by Jenau ak Nyuai split from Manggoi's longhouse and went further upstream of Sungai Niah and built a new longhouse near Kuala Sungai Sah. Sungai Sah is another tributary of Sungai Niah. Jenau anak Nyuai was appointed *tuai rumah* at this new longhouse.

[10] After Jenau ak Nyuai died, his son, Ranggong ak Jenau ('the first plaintiff in the first suit') became the *tuai rumah* of the longhouse and their longhouse is now known as Rumah Ranggong.

[11] A few years after the Japanese occupation in Sarawak, officials of the British Colonial Administration stationed at Niah and Miri went to the plaintiffs' longhouse and told the resident that they wanted to fix and record the communal land boundary between the plaintiffs' longhouse and the longhouses neighbouring them, namely, Rumah Remang (now called Rumah Umpur), Rumah Penghulu Manggoi (now called Rumah Ampau) and Rumah Gawan (now called Rumah Belilie).

[12] The land or area within the communal land boundary of the plaintiffs' longhouse (Rumah Ranggong), has been identified by the former native office at subdistrict office at Sepupok, Niah as 'Ranggong's Area' in the 'Composite Plan Showing Distribution of Native Farming Land at Suai/Niah/Sibuti' as stated at paras (vi) and (vii) of the plaintiffs' statement of claim.

[13] Then, a boundary or perimeter survey using GPS equipment of the said communal land boundary or the *antara/garis menoa* of the plaintiffs' longhouse was carried out in 2001 and 2010 respectively and the GPS points or coordinates collected was used by PW12 (Mark Bujang) to plot the map of the same (exh P12).

[14] The plaintiffs asserted that the said communal land boundary between the plaintiffs' longhouse (Rumah Ranggong) has remained the same and it has always been recognised or accepted by the people of the neighbouring longhouses until today.

[15] The land within the said communal land boundary or *antara/garis menoa* of their longhouse comprises that longhouse area, their farms and gardens 'temuda', burial ground and their 'pulau' area.

[16] The plaintiffs further asserted that on 5 January 2005, the second defendant issued the provisional lease described as Lot 91 to the first defendant over their NCR land. They contended that the issuance of the said provisional lease was wrongful and in disregard of the plaintiffs' NCR acquired and subsisting in or over the said parcel of land.

[17] As alluded to earlier in this judgment, the learned trial judge dismissed both the plaintiffs' claim and the first defendant's counterclaim. However, the learned trial judge did not grant any order in respect of the second suit.

[18] Being dissatisfied with the impugned decisions, both the first defendant and the plaintiffs appealed to this court. Hence, these appeals before us.

FINDINGS OF THE LEARNED TRIAL JUDGE

[19] After carefully considered all the evidence adduced before the court, the learned trial judge held that the plaintiffs in the first suit had failed on a balance of probabilities to establish that they had inherited and/or acquired NCR over the land within Lot 91 Sawai Land District and the claimed area.

[20] The step by step reasoning of the learned trial judge has been correctly summarised by learned counsel for second and third defendants in his written submission at pp 3–7. Much judicial time will be saved by reproducing the same with some modifications:

(a) under native customs in Sarawak, a native of Sarawak can create and acquire NCR over land by clearing of virgin jungle and farming the land which has been cleared or inheriting the native customary lands from their ancestors. These customs have been recognised and codified in legislations in Sarawak. Section 2 of the Sarawak Land Code defines 'Native Customary Land' to include land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1 January 1958, and still subsist as such. Pursuant to s 5(1) of the Sarawak Land Code, as from 1 January 1958, NCR may be created in accordance with the native customary law of the community concerned by any of the methods specified in s 5(2), if a permit is obtained from the district officer under s 10 (see *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149; [2013] 4 AMR 701);

(b) the burden is on the plaintiffs and PW17 to prove the acquisition of NCR in accordance with the laws of Sarawak in respect of the land claimed by them. It must be proven by cogent evidence and not by bare assertions (see *SOP Plantations (Suai) Sdn Bhd v Ading ak Layang & Ors* [2004] 4 MLJ 180);

(c) the composite plan was a photocopy. It was not drawn to scale, and the maker was unknown and was not called to testify. The contents of ID9, therefore, were hearsay;

(d) ID9 did not state or set out any particulars concerning the perimeter, size and extent of the NCR land of the plaintiffs and could not be used to establish the perimeter, size or extent of the NCR land claimed by the plaintiffs;

(e) exh P22 was a photocopy of a hand drawn sketch plan. It was also not drawn to scale; the maker was unknown and therefore the contents were

hearsay. Similarly, P22 did not set out or state the exact perimeter of the NCR land, the size or area of the NCR land claimed by the plaintiffs;

(f) both ID9 and P22 referred to Ranggong's area and was probably prepared by the district office in the 1980's after Ranggong anak Jenau was appointed *tuai rumah* in 1980. If ID9 and P22 were prepared in the 1940's or 1950's as alleged by the plaintiffs, their longhouse should have been referred to as Jenau's area instead as Ranggong's area because Jenau ak Nyuai was then their *tuai rumah*. This would contradict the claims of the plaintiffs that the boundary or *pemakai menoa* of their longhouse was demarcated and approved in the 1940's or 1950's after the Japanese occupation. As such, little weight should be given to ID9 and P22 to substantiate the perimeter, extent and area of their NCR land claimed by the plaintiffs;

(g) PW12 did not have any personal knowledge on the history of the plaintiffs' NCR claim; the exact location, the perimeter, extent and area of their NCR claim. He did not visit the NCR land claimed by the plaintiffs. He prepared the maps ID7 and P12 based on the GPS data given to him by PW13, PW14 and PW15. He was not in a position to verify or confirm the accuracy of the GPS data given to him because he was not present during the survey;

(h) none of the Tembawai ie Tembawai 5 Tinting, Tembawai Sengayan, Tembawai Sg Situk were shown in ID7 and P12. Nor were they shown to be located inside Lot 91, which would have substantiated their claim that Lot 91 was inside their NCR land and belong to them;

(i) further, ID7 and P12 did not show the individual parcels of land claimed and owned by the plaintiffs. The plaintiffs had not exhibited any map or sketch plan or any document which set out the individual parcels or field lots and the size thereto belonging to the residents of Rumah Ranggong which they alleged. This has raised doubt about the accuracy of the maps prepared by PW12. The only reasonable inference to be drawn is that there were no such Tembawai or no individual parcels of land claimed by the plaintiffs inside Lot 91;

(j) pursuant to the government policy, permission must be obtained to fell virgin jungle for the purpose of planting *padi* and creating customary rights and permission for farm land was limited to 5–7 acres only per family. Therefore, the size of the NCR land of 6,048,45 hectares claimed by the plaintiffs could not be correct as at 1 January 1958 or in 1963 and could not be substantiated (see documents exhibited in BOD7, in particular D11, D13, D14, D15, D18, D22 and D26);

(k) the plaintiffs did not present any evidence to contradict the testimony of DW3;

(l) the evidence showed that the residents of Rumah Ranggong commenced planting oil palms within their claimed NCR land, including inside Lot 91, only in the 1970's. As stated above, they did not apply for any permit to acquire NCR land after 1 January 1958 and there was no evidence that Lot 91 was their NCR land. There was also no evidence to establish that they had inherited or acquired NCR within Lot 91 prior to 1 January 1958;

(m) there is no provision in the Land Code (Sarawak) which provides that the plaintiffs or the native occupiers of state land should be given priority or preference or a right to be heard in the event that the Sarawak Government intended to alienate the land occupied by them to a third party;

(n) the assistance rendered to the plaintiffs by the Malaysian Palm Oil Board ('MPOB') was under the Malaysian Palm Oil Board Act 1998, which replaced the Palm Oil Registration and Licensing Authority (Incorporation) Act 1976 and the Palm Oil Research and Development Act 1979. It is a Federal legislation. Its primary functions are to set up the Malaysian Palm Oil Board and to regulate the oil palm industry in Malaysia. MPOB is not concerned with the ownership, registration, occupation, possession or use of land. It has no control, power or jurisdiction to decide on the ownership, registration, occupation, possession or use of land in Sarawak. Any assistance rendered to any of the plaintiffs by MPOB did not and cannot bind the Sarawak Government in respect of any legitimate expectation to be alienated or be given a right to be heard in respect of the land applied for by them;

(o) the Local Authorities (Annual Payment In Lieu of Rates) Order 2006 only came into force on 1 January 2006, after the land had been alienated and the provisional lease had been issued to the first defendant on 9 November 2022. The annual payment in lieu of rates, after the land had been alienated to the first defendant, could not amount to any legitimate expectation that the plaintiffs would be alienated the land or part thereof or be given a right to be heard by the second and third defendants prior to the alienation of the land to the first defendant;

(p) there was no evidence adduced to establish that there was promise made or encouragement given to the plaintiffs and their ancestors by the second or third defendant; their servants and or agents to settle, occupy, cultivate or use the land inside Lot 91. The second and third defendants did not allocate any area inside Lot 91 to the plaintiffs or to their ancestors and did not fix or survey or record any boundary of the land described as Lot 91 and claimed by the plaintiffs; and

(q) from the evidence adduced before the court, the plaintiffs in the first suit, had failed on the balance of probabilities to prove that they had inherited and or acquired NCR claims over the land within Lot 91 Sawai Land District.

THE APPEAL

[21] At the outset, we must say that the issues raised by the plaintiffs mainly concern the findings of fact by the learned trial judge. Learned counsel for the plaintiffs raised the sole ground in impugning the decision of the learned trial judge, namely, the learned trial judge had erred in law and/or in fact in failing to apply or had failed to apply correctly the 'balance of probability' test to the evidence of the plaintiffs' witnesses in respect of communal land boundary or *antara/garis* of their longhouse (Rumah Ranggong).

[22] Learned counsel for the first defendant raised the sole ground in assailing the decision of the learned trial judge, namely, the learned trial judge ought to have allowed the first defendant's counterclaim in the second suit since His Lordship had dismissed the plaintiffs' claim that they had acquired and/or inherited NCR over Lot 91.

THE PLAINTIFFS' SUBMISSION

[23] Learned counsel for the plaintiffs submitted that the plaintiffs had clearly established that Lot 91, Sawai Land District over which the first defendant had been issued with the provisional lease is located within the communal land boundary or *antara/garis menoa* of the plaintiffs' longhouse (Rumah Ranggong) as shown in exh P12.

[24] Learned counsel for the plaintiffs posited that the plaintiffs' oral evidence are more than sufficient to prove the same. Learned counsel took us through the evidence of PW1 (Empadin ak Lasa), PW17 (Changgai ak Dali from Rumah Ranggong), PW2 (Jalang ak Imbak, from Rumah Umpur), PW3 (Buat ak Jenau from Rumah Ampan) and PW4 (Belilie ak Lium from Rumah Belilie). Learned counsel also referred us to the evidence of PW13 (Egai ak Jenging), PW14 (Micheal ak Badak and PW15 (Gungan ak Lamat) who took the GPS to plot the map (exh P12). According to learned counsel, all the evidence showed that rivers such Sungai Niah, Sungai Sah, Sungai Masirat and Sungai Gurong marked the communal land boundary of the plaintiffs' longhouse.

[25] With respect, we disagree with the submission of learned counsel for the plaintiffs. In our considered view, the learned trial judge's findings of fact were thorough, detailed and amply supported by substantial evidence on record.

The learned trial judge provides legally acceptable articulated reason for rejecting the evidence of the plaintiffs' witnesses. We find no cogent reason to disturb the learned trial judge's findings of fact.

[26] We have also ourselves independently scrutinised the evidence on record and we have reached the same conclusion as the learned trial judge did. We find that:

(a) the plaintiffs' evidence does not show that Lot 91 is within the plaintiffs' alleged communal land boundary. On the contrary, the evidence clearly shows that PW17 unilaterally attempted to expand the extent of 'Ranggong's area' shown in ID7. This is because PW17 had admitted that the land within Lot 91 was cleared and cultivated by himself and the other people from Rumah Ranggong in 2000 or thereabout;

(b) the size of the NCR land of 6,048.45 hectares claimed by the plaintiffs could not be correct as at 1 January 1958 or in 1963 and could not be substantiated. Bearing in mind that pursuant to the government policy, permission must be obtained to fell virgin jungle for the purpose of planting padi and creating customary rights and permission for farm land was limited to 5–7 acres only per family for farming;

(c) none of the Tembawai ie Tembawai 5 Tinting, Tembawai Sengayan, Tembawai Sg Situk were shown in ID7 and P12. Since the Tembawai were not shown to be located inside Lot 91, the plaintiffs' claim that Lot 91 was inside their NCR land and belong to them could not be substantiated;

(d) PW12 did not have any personal knowledge on the history of the plaintiffs' NRC land claim, the exact location, the perimeter, extent and area of their NRC claim. He did not visit the NCR land claimed by the plaintiffs. He prepared the maps ID7 and P12 based on the GPS data given to him by PW13, PW14, and PW15. Therefore, accuracy of the maps ID7 and P12 is doubtful; and

(e) there is no provision in the Land Code (Sarawak) which provides that the plaintiffs or the native occupier of state land should be given priority or preference or a right to be heard in the event that the Sarawak Government intended to alienate the land occupied by them to a third party (see *Lah Anyie & Ors v Land Custody and Development Authority (LCDA) & Ors* (Miri High Court Suit No 22–59 of 1997 (MR)) (unreported); *Bato Bagi & Ors v Government of the State of Sarawak* [2008] 5 MLJ 547).

[27] The learned trial judge had considered ID9 even though it was not marked as an exhibit. We agree with the approach taken by the learned trial judge in dealing with ID9 and exh P22. The learned trial judge stated:

27. Although PW1 and PW17 had testified that the boundary of their NCR was demarcated in the 1940's and recorded officially in the 1950's by officials from the Miri District Office and the subdistrict office at Sepupok Niah, the plaintiffs have not and were unable to produce any record, minutes of meeting or document to substantiate their claims that he boundary of their NCR land had been fixed, settled or approve das such. The plaintiffs did not call an SAO of the district office from Miri District Office or Niah District Office or subdistrict office at Sepupok Niah to confirm as such and or to produce and tender such a book which recorded the boundary of their longhouse.

28. The plaintiffs have referred to and merely produced a composite plan (at p 5 of BOD1) (marked as ID9) only and another map of their *pemakai menoa* (at p 2 of BOD12) marked as exh P22 to show the boundary of their NCR land. P22 was marked as an exhibit through PW17 on the basis that TR Ranggong (deceased) received this document form an SAO, the weight and accuracy subject to proof. The plaintiff's witnesses testified that these were the official records of their NCR land.

29. The composite plan was a photocopy. It was not drawn to scale the maker was unknown and was not called to testify. The contents of ID9 were hearsay. PW7 was a former chief draughtsman of the Lands and Surveys Department in Miri. He was subpoenaed to testify by the plaintiffs on ID9. He said this plan was not prepared by the Lands and Surveys Department, Miri but was given to his office from the District office many years ago. He could not remember the date and could not confirm the accuracy or the contents of ID9.

30. ID9 was described as a composite plan showing distribution of native farming land at Suai, Niah and Sibuti. As the name suggested, it was a compilation or combination of different plans or areas put together to represent native farming land at Suai, Niah and Sibuti. It referred to the farming areas by the name of the tuai rumah, for example Manggoi's area, Remang's area and Rangong's area. ID9 did not state or set out any particulars on the perimeter, size and extent of the NCR land of the plaintiffs and could not be used to establish the perimeter, size or extent of the NCR land claimed by the plaintiffs.

31. Similarly, the map (exh P22) referred to Rumah Ranggong, Rumah Manggoi and Rumah Along. The plaintiffs referred to a date '18th May 1956' which was written on this map and submitted that that was the date when the boundary of their NCR land was demarcated and recorded by the District Office of Niah. *Exhibit P22 was a photocopy of a hand drawn sketch plan. It was not drawn to scale, the make is unknown and the contents were hearsay*. At the top right hand corner of this sketch map, there was a certification by a SAO in 1981 who purportedly gave a copy of this sketch plan to TR Ranggong (deceased). PW17 could not remember the name of this SAO and this SAO was not called testify on the truth and accuracy of the contents of this map. Similarly P22 did not set out or state the exact perimeter of the NCR land, the size or area of the NCR land claimed by the plaintiffs.

32. Based on the testimony of PW1 and PW17, Ranggong was appointed the tuai rumah of their longhouse in 1980 (see exh P1). He would be known as TR Ranggong to the District office, Niah. ID9 and p22 both referred to Ranggong's area and was probably prepared by the district office in the 1980's after Ranggong was appointed tuai rumah in 1980. If ID9 and P22 were prepared in the 1940's or

A 1950's as alleged, their longhouse are should have been referred to as Jenau's aea instead of Ranggong's area because TR Jenau ak Nyuai was then their tuai rumah. This would contradict the claims of the plaintiffs that the boundary or *pemakai menoa* of their longhouse was demarcated and approved in the 1940's or 1950's after the Japanese occupation. *Therefore little weight should be given to ID9 and P22 to*
B *substantiate the perimeter, extent and area of the NCR land claimed by them*. (Emphasis added.)

[28] It is pertinent to note that the court's decision in every case will depend upon whether the party concerned has satisfied the particular burden and
C standard of proof imposed on him or her. Pursuant to ss 101 and 102 of the Evidence Act 1950 ('Act 56'), the legal burden of proof is placed on the party who asserts the existence of any fact in issue or relevant fact.

[29] Section 101 of Act 56 reads:
D

> Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

And s 102 provides:
E

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[30] In a civil case, the plaintiff must prove its case on a balance of
F probabilities. This has been interpreted to mean that it must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the court can say 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not (see *Miller v Minister of Pensions* [1947] 2 All ER 372 at p 374). As Lord Hoffman
G explained *In re B (Children)* [2009] AC 11 at para 2:

> If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt
H is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

I **[31]** In the case of *U Television Sdn Bhd & Anor v Comintel Sdn Bhd* [2017] 5 MLJ 292, the Federal Court made the following observations on what the 'burden of proof' entails:

> 35. On the meaning and application of the term 'burden of proof' s 101 of the Evidence Act 1950 ('the Act') states that it is the burden to establish a case which

rests throughout on the party who assert the affirmative of the issue. The 'burden of proof' in s 102 of the Act is the burden to adduce evidence, to make out or rebut the claim. The 'burden of proof' in s 102 of the Act shifts from one side to the other according to the weight of the evidence.

[32] The burden of proof placed on the plaintiff is very strict. There is no room for any guesswork, speculation, surmises or conjecture ie acting on a mere possibility.

[33] The plaintiffs' witnesses' testimonies must be corroborated by credible evidence as their self-serving testimonies carry little or no weight in the absence of some other corroborative evidence. In the case of *SOP Plantations (Suai) Sdn Bhd v Ading ak Layang & Ors* the court stated:

37. In the case of *Ara binte Aman & Ors v Superintendent of Lands and Mines 2nd Division* [1979] 1 MLJ 208, the appellant claimed native customary rights over certain lands. Their claim was dismissed by the District Court at Kuching and they appealed to the High Court. The High Court dismissed the appeal. In that case, evidence was adduced by the appellant to show that the jungle was felled when one of the witnesses in that case was only 13 years old. The appellants also told the trial court that they knew about the land because their father and mother told them about it. The High Court which heard the appeal said that in cases of this nature the issue is one of fact and found that this evidence unsatisfactory. As such, the court said, the appellants failed to discharge the burden of proof. At p 208, the court says as follows:

> That all the appellants in this case failed to discharge the burden of proof which lay upon them to prove that at the time of Settlement they were entitled to the parcels of land is plain enough.
>
> Their evidence has been proved to be uncorroborated, unconvincing, contradictory, and based partly on hearsay.

38. Whilst it is true that the case of *Ara binte Aman & Ors*, was decided after a full trial, the principle remains the same. That is the burden is on the defendants to prove the existence of the native customary rights and if the court finds, on the affidavits' evidence, that the evidence is unsatisfactory and unconvincing, the court may reject the evidence. To prove their claim of native customary rights the defendants must do so by cogent evidence. Bare assertion would not be sufficient (*lihat Tapah bin Bangkol v Superintendent of Lands and Surveys* [1999] 3 MLJ 588).

[34] In these instant appeals, we agree with the findings of fact of the learned trial judge that no credible evidence or corroborating evidence to support the plaintiffs' own self-serving statements that Lot 91 is within the boundary of land previously allocated or distributed to Rumah Ranggong by the government for their farming.

[35] Even if it can be established that Lot 91 is within the boundary of land previously allocated or distributed to Rumah Ranggong, that itself does not mean that Lot 91 is part of the plaintiffs' NCR land because all other land within such boundary is still crown or state land (and not NCR land), which the plaintiffs are required to apply for a permit to fell and farm such land. However, the plaintiffs herein do not possess such permit at all.

[36] We find that the learned trial judge had scrutinised the evidence with care in deciding whether Lot 91 is within the boundary of land previously allocated or distributed to Rumah Ranggong by the government for their farming. His Lordship finds that there is no clear, convincing and cogent evidence in order to satisfy the balance of probabilities test. The learned trial judge had considered the totality of the evidence and had assessed the impact of contradictions obtaining in the evidence of the plaintiffs' witnesses pertaining to the core issue in the case. The learned trial judge also had considered the credibility and reliability of the plaintiffs' witnesses.

[37] It has been stated by our courts, in numerous cases, that the appellate courts will not lightly disturb findings of fact made by a trial judge. It is only in cases where the findings of the trial judge are not supported by the evidence, or it is clear that the trial judge was 'plainly wrong'.

[38] In *Swiss Garden Rewards Sdn Bhd v Mohamed Ashrof Tambi bin Abdullah & Ors* [2017] 4 MLJ 164 (CA), this court had this to say:

> [35] The correct approach of an appellate court or a reviewing court when invited to intervene with the factual findings of a trial judge was restated by the Supreme Court of United Kingdom in *Mcgraddie v Mcgraddie* [2013] 1 WLR 2472 and accurately summarised in the head note:
>
> > It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong.
>
> Lewison LJ returned to the topic in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] ETMR 26. In a vivid passage at para [114] he said:
>
> > Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applied not only to findings of primary fact, but also the evaluation of those facts and to inferences to be drawn from them. ... The reasons for this approach are many. They include:
> >
> > (i) The expertise of the trial judge in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

(ii) The trial is not a dress rehearsal. It is the first and last night of the show.

(iii) Duplication of the trial judge's role on appeal is a disproportionate use the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

(v) The atmosphere of the court room cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

[39] With respect, the plaintiffs had failed to demonstrate to us that the conclusion reached by the learned trial judge was 'plainly wrong'. Indeed, there were evidence to support those findings. There is no reason to disturb his findings. Therefore, the plaintiffs' appeal in respect of first suit must fail.

COUNTERCLAIM BY THE FIRST DEFENDANT

[40] Learned counsel for the first defendant submitted that the plaintiffs had admitted in their witness statements, affidavits and testimonies in court that they and the residents of Rumah Ranggong had been cultivating on Lot 91 and since the learned trial judge had dismissed the plaintiffs' claim that they had acquired and/or inherited NCR over Lot 91, the learned trial judge ought to have granted the reliefs sought for in the first defendant's counterclaim ('the second suit').

[41] The learned trial judge dismissed the second suit on the grounds that the first defendant did not:

(a) plead that first to 11th plaintiffs and/or the residents of Rumah Ranggong had trespassed and occupied Lot 91; and

(b) identify who were the resident or persons who had trespassed and occupied Lot 91.

[42] We agree with the findings of the learned trial judge. Further, we are of the opinion that granting of the reliefs sought for in the first defendant's counterclaim would be likely to cause substantial hardship to the plaintiffs. The first defendant's right as the registered proprietor of Lot 91, Sawai Land District has been recognised and/or vindicated by the court. The matter should stop there.

A **[43]** We, therefore, dismissed the first defendant's appeal in second suit as well.

CONCLUSION

B **[44]** In the result, both appeals are dismissed with no order as to costs. We also ordered that the respective deposits to be refunded to the plaintiffs and the first defendant. So ordered.

Appeals dismissed with no order as to costs.

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Reported by Fatin Mohd Ismail

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